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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

THE PEOPLE OF THE COMMONWEALTH
OF MASSACHUSETTS,
Petitioner,

VS.

OSBORNE SHEPPARD,
Respondent.

ON PETITION FROM THE SUPREME COURT OF THE COMMONWEALTH OF MASSACHUSETTS

BRIEF OF LAWS AT WORK (L.A.W.) AS AMICUS CURIAE IN SUPPORT OF PETITIONER JOINED BY THE STATES OF ALABAMA, KENTUCKY, MISSOURI AND NEBRASKA

G. JOSEPH BERTAIN, JR., ESQ.
Vice-President, L.A.W.
San Francisco, California
LLOYD DUNN, ESQ.
Vice-President, L.A.W.
DONALD E. SANTARELLI, ESQ.
National Advisory Council, L.A.W.
Washington, D.C.
ROBERT L. TOMS, ESQ.
Vice-President, L.A.W.
Los Angeles, California
HAROLD S. VORCHELIN
Vice-President, L.A.W.
Los Angeles, California

Counsel for Amicus Curiae
ROBERT F. KANE,
Attorney at Law
1125 Marshall Street
Redwood City, CA 94063
(415) 364-8200

THE HONORABLE
GEORGE DEUKMEJIAN
Governor of the State of California
THE HONORABLE
JOHN JAY DOUGLASS
Dean, National College of District Attorneys
National Advisory Council, L.A.W.

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Secondary Sources

Kaplan, The Limits of the Exclusionary Rule, 26 Stanford Law Review 1027 .....7, 11
Schroeder, Deterring Fourth Amendment Violations: Alternatives to the Exclusionary Rule, 69 Georgetown Law Journal 1361 (1981) 8, 10

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BRIEF OF LAWS AT WORK (L.A.W.) AS AMICUS CURIAE IN SUPPORT OF PETITIONER JOINED BY THE STATES OF ALABAMA, KENTUCKY, MISSOURI AND NEBRASKA

This brief *amicus curiae* is submitted pursuant to Supreme Court Rule 36, Petitioner's and Respondent's letters of consent thereto having been previously filed with the Clerk of the Court.

INTEREST OF AMICUS CURIAE

The signators to this brief share a common interest in the case at bar. Laws At Work is a non-profit corporation of citizens organized to foster the rights of both the law-abiding and the victims of crime. Toward that end, Laws At Work advocates the criminal justice system reform nec-

essary to insure that those rights are vindicated when threatened.

Laws At Work evolved from Citizens for Law Enforcement Needs founded for the above stated purpose by the late Don Belding, Doris Dolan and Dr. C. Erwin Piper in 1966.

For more than 16 years Doris Dolan has served as the volunteer director of state and national criminal justice projects incorporating active participation in all segments of the criminal justice system. In addition, its members have presented research upon request before governmental committees and fact-finding commissions, the latest being representative participation on the President's Task Force on Victims of Crime 1982-83.

The Attorneys General of the States of Alabama, Kentucky, Missouri and Nebraska are the chief law enforcement officers of their states, with oversight for the fair and effective enforcement of the laws therein.

In the light of those goals to which these signators are dedicated, amicus has studied with particular attention, and growing concern, the effect of the exclusionary rule upon the criminal justice system during the course of the rule's judicial expansion. So seemingly irrational has its application become within the context of an increasing number of cases, that amicus has added its voice to those of many others who urge the rule's reform:

> These developments, borne of years of experience with the exclusionary rule in operation, forcefully suggest that the exclusionary rule be more generally modified *to permit the introduction of evidence obtained in the*

reasonable good-faith belief that a search or seizure was in accord with the Fourth Amendment.[1]

Perhaps no more egregious example of this irrationality, and no more compelling instance of this need for reform, can be cited than the case now before the Court, in which a first degree murder conviction was reversed solely because a warrant issued upon probable cause, *and executed in good faith*, was technically deficient.

Because this Court has reserved "for another day"[2] the question whether the exclusionary rule should be modified to prevent such instances of its untoward application, Laws At Work believes it should express its views by means of this brief *amicus curiae*, in the event that this should prove to be that other day.

STATEMENT OF THE CASE

The facts of this case are set forth in great detail in the Opinion of the Supreme Court of the Commonwealth of Massachusetts, which amicus assumes in turn comprises part of the Joint Appendix before the Court. In order that this brief *amicus curiae* not be prolix, amicus will refrain from repeating them *verbatim* herein.

Respondent's motion to suppress evidence having been denied by the trial court, he was subsequently tried and convicted of first degree murder. After that conviction was reversed by the Supreme Court of the Commonwealth of Massachusetts, the Commonwealth petitioned this Court for a Writ of Certiorari, which was granted on June 27, 1983.

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[1] *Illinois v. Gates*, ... U.S. ...., at ...., 103 S.Ct. 2317, at 2340 (1983) (WHITE, J., concurring) [Emphasis added].

[2] *Illinois v. Gates*, ... U.S. ...., at ...., 103 S.Ct. 2317, at 2325 (1983).

SUMMARY OF ARGUMENT

The criminal justice goals of any democratic society are twofold: To ensure fairness to the accused, and to secure convictions of the guilty. The former is promoted by the deterrence of official misconduct, and the latter by a jury's impartial evaluation of probative evidence; both ends are complementary in their means.

Since its adoption, the exclusionary rule has represented a judicial remedy fashioned upon a deterrence rationale intended to promote the first of these two goals. Because it operates through the suppression of highly probative and inherently trustworthy evidence, however, the effect of the rule upon the criminal justice system is often to render its two aims mutually exclusive. Injudiciously imposed, the rule indeed frequently operates in derogation of the latter, wholly without regard to whether prejudice tainted the former.

Enlightened by the recognition that the exclusionary rule thus sacrifices one goal at the cost of the other, the decisions of this Court reflect a continuing effort to strike a more sensitive balance in its application. The occasion compelling another such effort arises when a technically deficient warrant is nonetheless issued upon probable cause and executed in good faith. In such cases, neither prejudice to the accused nor misconduct by the police exist as wrongs which can only be remedied by the suppression of relevant evidence; the truthseeking goal of criminal justice is disserved at great cost to no purpose. Amicus respectfully urges the Court to right this balance by ruling that the two goals of criminal justice are *not* mutually exclusive, and that an objective good-faith standard to the application of the exclusionary rule can fairly accommodate both.

ARGUMENT

THE EXCLUSIONARY RULE DOES NOT COMPEL THE SUPPRESSION OF EVIDENCE SEIZED PURSUANT TO A TECHNICALLY DEFICIENT WARRANT ISSUED UPON PROBABLE CAUSE AND EXECUTED IN GOOD FAITH

A. The Exclusionary Rule is Not Coextensive With the Fourth Amendment

No part of the Fourth Amendment itself, since *Weeks v. United States*[3] the exclusionary rule has been developed by this Court as a purely judicial remedy for violations of those substantive rights which the Fourth Amendment guarantees. As such, its function is to deter police misconduct,[4] upon the rationale that the cost of probative evidence lost is worth the price to ensure that police investigatory methods conform to Constitutional standards.

In recognition of the rule's judicial source and deterrence rationale, however, the Court has demonstrated that the rule is not coextensive with the Fourth Amendment itself, by taking care to ensure that its application is rationally "restricted to those areas where its remedial objectives are thought most efficaciously served."[5] The exclusionary rule thus "has never been interpreted to proscribe the introduction of illegally seized evidence in all proceedings or against all persons."[6] Such evidence has for example been held ad-

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[3]232 U.S. 383 (1914).

[4]*Stone v. Powell*, 428 U.S. 465, 486 (1976); *United States v. Janis*, 428 U.S. 433, 446 (1976); *United States v. Calandra*, 414 U.S. 338, 348 (1974).

[5]*United States v. Calandra*, 414 U.S. 338, at 348 (1974).

[6]*Stone v. Powell*, 428 U.S. 465, at 486 (1976).

missible for purposes of impeachment;[7] over the objections of those without standing to assert the rule;[8] in federal civil proceedings following state officials' seizure;[9] despite a tainted source of derivative live testimony;[10] following an arrest based upon a subsequently invalidated statute or ordinance;[11] and for use in grand jury proceedings.[12]

In this latter context, the Court has made explicit its recognition of the need for a sensitive balance between the benefits and burdens implicit in the exclusion of probative evidence for the sake of deterrence:

> Any incremental deterrent effect which might be achieved by extending the rule to grand jury proceedings is uncertain at best . . . . We therefore decline to embrace a rule that would achieve a speculative and undoubtedly minimal advance in the deterrence of police misconduct at the expense of substantially impeding the role of the grand jury.[13]

It is moreover necessarily the proper office of this Court to maintain the integrity of that balance, as it is nowhere struck by the Fourth Amendment itself:

> [T]he exclusionary rule is merely one arbitrary point on a continuum between deterrence of illegal police

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[7] *United States v. Havens*, 446 U.S. 620 (1980); *Walder v. United States*, 347 U.S. 62 (1954).

[8] *Brown v. United States*, 411 U.S. 223 (1973); *Alderman v. United States*, 394 U.S. 165 (1969); *Rakas v. Illinois*, 439 U.S. 128 (1978).

[9] *United States v. Janis*, 428 U.S. 433 (1976).

[10] *United States v. Ceccolini*, 435 U.S. 268 (1978).

[11] *United States v. Peltier*, 422 U.S. 531 (1977); *Michigan v. DeFillippo*, 443 U.S. 31 (1979).

[12] *United States v. Calandra*, 414 U.S. 338 (1974).

[13] *Id.*, at 351-2. [Footnote omitted].

> activity and conviction of guilty persons. As a stopping point, it can be justified solely on the ground that it achieves a better balance between these twin goals than would other points. *If another stopping point does the job better, it should replace the current exclusionary rule.*
>
> This type of "quasi-constitutional" law is not unique to the Fourth Amendment area. The Supreme Court recognized in *Miranda* that the prohibitions it had layed down would stand unless and until an equally good method of protecting the constitutional values in question was developed. *In other words, the rule is not written into the Constitution.* Rather, the Constitution demands something that works—presumably at a reasonable social cost. The content of the particular remedial or prophylactic rule is thus a pragmatic decision rather than a Constitutional fiat.[14]

When, as in the case now before the Court, the indiscriminate application of the exclusionary rule imposes its burdens without yielding a concomitant deterrent benefit, a grave injustice is done which is constitutionally unnecessary and therefore corrigible.

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[14]Kaplan, *The Limits of the Exclusionary Rule*, 26 Stanford Law Review 1027, at 1030 [Footnote omitted; emphasis added] *See also, United States v. Williams*, 622 F.2d 830 (5th Cir. 1980), *cert. den.* 449 U.S. 1127 (1981); Ariz. Rev. Stats. § 13-3925 (Crim. Code 1982); Colo. Code Crim. Proc. § 15-3-308 (1982); *and* Utah Code § 77-35-12(g) (Code Crim. Proc. 1982) and § 78-16-1 (Jud. Code 1982). The California Constitution was amended on June 8, 1982 by the addition of Article I, Section 28(d), which effectively removed pre-existing Constitutional, statutory and decisional bases for excluding relevant evidence in criminal trials. Because such exclusion is now confined to federal Constitutional grounds, this Court's adoption of a good-faith standard would be binding upon the State of California.

B. Suppression Serves No Deterrent Purpose

Assuming[15] deterrence of police misconduct to be the primary benefit in the exclusionary rule balance, various commentators and members of this Court have nonetheless rightly observed that no such benefit attends the suppression of evidence seized pursuant to a warrant which is technically deficient, but obtained and executed in objective good faith. The police have conformed in such a case in every respect to the goals which the Fourth Amendment seeks to achieve, and suppression at trial becomes little more than a rule in search of a rationale:

> When officers have dutifully obtained a search warrant from a judge or magistrate, and execute the warrant as directed by its terms, exclusion of the evidence thus obtained cannot be expected to deter future reliance on such warrants. The warrant is prima-facie proof that the officers acted reasonably in conducting the search or seizure; "once the warrant issues, there is literally nothing more the policeman can do in seeking to comply with the law."[16]

Moreover in practical effect, the chronic application of the exclusionary rule in such cases may serve to undermine the Fourth Amendment preference that seaches be conducted pursuant to warrants:

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[15]The deterrent effect of the exclusionary rule has yet to be empirically established. *See generally, United States v. Janis*, 428 U.S. 433, 449-453 (1976).

[16]*Illinois v. Gates*, ... U.S. ...., at ...., 103 S.Ct. 2317, at 2345 (1983) (WHITE, J. concurring), *quoting Stone v. Powell*, 428 U.S. 465, at 498 (1976) (BURGER, C.J., concurring). *See also*, Schroeder, *Deterring Fourth Amendment Violations: Alternatives to the Exclusionary Rule*, 69 Georgetown Law Journal 1361, at 1419 (1981).

> Excluding evidence for these reasons can have no possible deterrent effect on future police conduct, unless it is to make officers less willing to do their duty. Indeed, applying the exclusionary rule to warrant searches may well reduce incentives for police to utilize the preferred warrant procedure when a warrantless search may be permissible under one of the established exceptions to the warrant requirement.[17]

Nor, assuming its continuing viability, does the "judicial integrity" rationale suffice to compensate for what deterrent benefit the rule lacks in such circumstances:

> The primary meaning of "judicial integrity" in the context of evidentiary rules is that the courts must not commit or encourage violations of the Constitution. In the Fourth Amendment area, however, the evidence is unquestionably accurate, and the violation is complete by the time the evidence is presented to the Court.[18]

In the case before the Court, no deterrent benefit justifies applying the exclusionary rule. The conduct of the police was entirely proper: Their investigation having established probable cause to arrest Osborne Sheppard for the murder of Sandra Boulware, they consulted with the district and assistant district attorneys in preparing an affidavit which meticulously established probable cause for both the arrest and search warrants. With no suitable search warrant form available on Sunday afternoon, the detective in charge made what he believed were the appropriate amendments to a controlled substances warrant, and submitted it to a

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[17] *Illinois v. Gates*, ... U.S. ...., at ...., 103 S.Ct. 2317, at 2345 (1983) (WHITE, J., concurring) [Citations omitted].

[18] *United States v. Janis*, 428 U.S. 423, at 458, note 35 (1976).

judge. The judge interlineated some additional changes before signing it, and the police proceeded to execute the warrant with the probable cause affidavit in their possession throughout the search, *in the good faith belief that the accompanying warrant was valid.* The search did not exceed the parameters of the warrant they believed they had obtained, and respondent suffered no prejudice: "The search was conducted in the same way and with the same results as it would have been conducted if the warrant had not been defective."[19] Such being the case, the exclusionary rule serves no deterrent purpose:

> When the police have dutifully applied to a judge or a magistrate for a search warrant, and have executed the warrant in strict conformity with its terms, exclusion of the evidence thus obtained can have no possible deterrent effect on future police conduct. Of course, exclusion of the evidence might improve the decisions of those magistrates who issue warrants pro forma or who lack the ability to evaluate intelligently the evidence before them. Even conscientious and well-trained magistrates occasionally make mistakes, however, and in such cases exclusion has absolutely no deterrent value. Thus, it makes sense to retain the exclusionary rule only for warrantless searches and those searches made on the authority of warrants based on perjured testimony or on evidence so scant that no reasonable magistrate could have believed it. This would encourage bona fide resort to warrants while also protecting individuals against abuse of warrant procedures.[20]

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[19]Opinion of the Supreme Court of the Commonwealth of Massachusetts, at 23. [Footnote omitted].

[20]Schroeder, *Deterring Fourth Amendment Violations: Alternatives to the Exclusionary Rule, supra,* at 1419.

Suppressing of evidence seized in such circumstances, based upon a technical Fourth Amendment violation attributable to purely judicial error, is neither a necessary nor desirable application of the exclusionary rule. Even were its relative burdens de minimus, in the complete absence of either misconduct by the police or prejudice to the defendant, the exclusionary rule thus imposed yields no deterrent benefit.

C. Suppression Disserves the Truthseeking Function of the Court

In the balance of benefits and burdens implicit in the application of the exclusionary rule, the burdens are often *not* de minimus. It has been pointed out, for example, that the disparity in particular cases between a minor police error and its attendant "windfall" to the accused deeply offends the public sense of proportionality in justice.[21] The rule exacts perhaps its heaviest toll in this regard when its effect is to free those who have already been convicted. To apply the exclusionary rule to the case before the Court may well have the effect of freeing the defendant.

The greatest burden imposed by the exclusionary rule, however, must surely be its cost in terms of probative evidence lost to the jury, whose truthseeking function can only be thereby disserved. In barring the admission of relevant and inherently trustworthy evidence, the exclusionary rule is indeed wholly at odds with that function, and may in circumstances such as those at bar bear resemblance less to a remedy by which the goals of criminal justice are fostered, than to an obstacle by which they are frustrated.

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[21] *Stone v. Powell*, 428 U.S. 465, at 490; *See also*, Kaplan, *The Limits of the Exclusionary Rule, supra*, at 1036.

Any remedy with such an effect "must bear a heavy burden of justification, and . . . be carefully limited to the circumstances in which it will pay its way by deterring official lawlessness."[11] When, as in the case before the Court, such justification is utterly lacking, the limitations of the rule must be redefined, lest the truthseeking function of the courts founder upon a solicitude for the accused disproportionate to the errors of the State.

CONCLUSION

Amicus respectfully submits in light of the foregoing that the exclusionary rule does not compel the suppression of evidence seized pursuant to a technically deficient warrant issued upon probable cause and executed in good faith; suppression in such circumstances disserves both the deterrence rationale of the rule and the truthseeking function of the courts. The judgment of the Supreme Court of the Commonwealth of Massachusetts should be reversed with directions accordingly.

Dated: September 10, 1983

Respectfully submitted,

Counsel for Amicus Curiae
ROBERT F. KANE,
Attorney at Law
Vice-President, L.A.W.

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[11] *Illinois v. Gates*, ... U.S. ...., at ...., 103 S.Ct. 2317, at 2342 (1983) (WHITE, J., concurring).

Laws At Work has been authorized by the Governor of the State of California, the Attorneys General of the following states and the Dean of the National College of District Attorneys to list them as joining in the brief *amicus curiae*.

Honorable George Deukmejian
Governor of the State of California
Honorable Charles A. Graddick
Attorney General of the State of Alabama
Honorable Steven L. Beshear
Attorney General of the State of Kentucky
Honorable John D. Ashcroft
Attorney General of the State of Missouri
Honorable Paul L. Douglas
Attorney General of the State of Nebraska
Honorable John Jay Douglass
Dean, National College of District Attorneys